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In The

Supreme Court of the United States

No. 74-6632

MINOR MOODY,

Petitioner,

v.

LOREN DAGGETT, WARDEN,

Respondent.

BRIEF FOR THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States the Commonwealth of Virginia as Amicus Curiae submits this Brief in support of Respondent. The interest of the Commonwealth of Virginia in this matter rests upon its acute concern with the continued existence and growth of the parole system as an integral part and increasingly more important part of the correctional system. Heavy emphasis is now being placed upon alternatives to incarceration as a result of a shift in emphasis from punishment to rehabilitation. The Commonwealth, while believing that parole procedures must be fair, believes that a proper and delicate balance must be struck and maintained between the parolee and a State.

While the instant case does not relate directly to the States and application of *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), to alleged State parole violators housed in out-of-State penal institutions as a result of having committed a criminal offense, the problem faced by the States is similar to that of the United States Parole Board, except that it is more accentuated. Since the decision in *Morrissey, supra*, the States have faced the problem presented in cases where an alleged parole violator has committed a criminal offense in another State and thereafter is sentenced to serve the sentence therefor in that State. The problem has been handled in various ways inclusive of simply deciding to take no action against such parole violators. This, of course, results in unequal treatment inasmuch as alleged parole violators not falling within that class were proceeded against.

Morrissey, supra, did not answer all questions and certainly left open disagreement as to what was constitutionally required in these instances.

The Commonwealth of Virginia, as well as other States, have a very great interest in determination of the question presented in the instant case. Amicus Curiae, therefore, for that reason has filed this Brief.

ISSUE PRESENTED

I.

May An Alleged Parole Violator Incarcerated For The Commission Of A Criminal Offense While On Parole Be Given A Final Parole Revocation Hearing Upon Completion Of Service Of The Sentence Received For Commission Of Such Offense?

RELEVANT CONSTITUTIONAL PROVISIONS

Fourteenth Amendment To The Constitution Of The United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARGUMENT

I.

An Alleged Parole Violator Incarcerated For The Commission Of A Criminal Offense While On Parole May Be Given A Final Parole Revocation Hearing Upon Completion Of Service Of The Sentence Received For Commission Of Such Offense.

In *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), this Court held the Due Process Clause of the Fourteenth Amendment to be applicable to revocation of parole and further held an alleged parole violator to be entitled to a preliminary parole revocation hearing and to a final parole revocation hearing. This Court stated in 408 U.S. at p. 488: "The (final) revocation hearing must be tendered within a reasonable time after the parolee is *taken into custody.*" (Emphasis supplied.) Neither of the two Petitioners in *Morrissey, supra*, was alleged to have violated terms or conditions of parole involving the commission of a criminal offense. Both Petitioners were "taken into custody" as the result of the issuance of a parole violation warrant.

This Court in *Morrissey, supra*, did not address itself to the issue presented in the instant case. In the instant case, the Petitioner found himself in custody as a result of the commission of a criminal offense and the sentence imposed therefor. The issuance or actual execution of a parole violation detainer warrant at his place of incarceration in no way

placed him "in custody," in the sense it referred to in *Morrissey, supra.*

The requirement that a final parole revocation hearing be held within a reasonable time after a parolee is taken into custody thus is difficult of application to the instant case. The Petitioner suffered no loss of liberty as a result of the issuance or filing of the parole violation detainer warrant, but, instead, suffered loss of liberty only as a result of having been convicted of a criminal offense. Even if the parole violation detainer warrant is considered as having placed the Petitioner in "constructive custody," such custody was of little moment in the face of actual custody and is not that about which this Court addressed itself in *Morrissey, supra.*

Amicus Curiae submits that the issuance or filing of a parole violation detainer warrant against an alleged parole violator who is incarcerated as a result of the commission of a criminal offense should not be held to "trigger" a requirement that a final parole revocation hearing be held within a reasonable time from the filing or issuance of the warrant. If, however, such issuance or filing of a warrant is held to "trigger" that requirement, it is submitted that such a requirement would be met if a final parole revocation hearing were held within a reasonable time subsequent to service of the sentence which the alleged parole violator is serving; in other words, the fact that the alleged parole violator is incarcerated should be of controlling significance in determination of the issue of when a reasonably prompt final parole revocation hearing should occur.

If an alleged parole violator has committed a criminal offense which is a matter of public record, he may not relitigate the same at his final parole revocation hearing. *Morrissey, supra,* at p. 490. He presumably, however, may present evidence which would mitigate against revocation of parole.

To require that a final parole revocation hearing be held soon after the issuance and filing of a parole violation detainer warrant in cases where the alleged parole violation is the commission of a criminal offense, where the alleged parole violator may only present mitigating circumstances, is not reasonable when the burden of such a requirement on the part of the States is considered. This Court in *Morrissey, supra,* clearly took into consideration the burden which would be imposed in setting forth its requirements.[1]

It is submitted, however, that two distinct issues, at first blush, present themselves if the position of Amicus Curiae is accepted. The first is that in certain instances it may well be that the filing of a parole violation detainer warrant against an inmate at his place of incarceration may cause him to be treated differently than other inmates in such institution who do not have parole violation detainer warrants filed against them. Amicus Curiae suggests that this issue may be met by either of two methods: (1) Agreements on the part of the incarcerating institutions to not treat such inmates differently, or (2) the filing of such parole violation detainer warrants upon the date set for discharge of such inmates by the incarcerating institution. Either of these two solutions would negate any chance of inmates' being subjected to prejudice as a result of the filing of a parole violation detainer warrant.

The second issue arises in cases where the final revocation hearing is held so long from the time of the commission of the criminal offense which constituted the violation of parole that the parole violator is unable to present mitigating circumstances which he otherwise would have been able to present, as in the case of the death of witnesses and the like.

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[1] "The few basic requirements set out above, which are applicable to future revocations of parole, should not impose a great burden on any State's parole system." 408 U.S. at p. 490.

It is submitted that in such cases the principles enunciated by this Court in *Barker* v. *Wingo*, 407 U.S. 514 (1972), should and could be considered by a parole board holding the final revocation hearing. In the event that the parole board, in balancing the principles of *Barker, supra,* should find that the failure to hold a final revocation hearing earlier constituted an unconstitutional delay, dismissal of the initial parole violation warrant would be proper.

It also has been suggested that in the absence of a prompt revocation hearing, a parole violator will loose all chance to have the sentence which he is serving for commission of the criminal offense run concurrently with any additional time he might receive as a result of revocation of his parole.

This suggestion is without merit. When a final parole revocation hearing ultimately is held, a parole board may, and surely would, consider that fact of incarceration as well as anything else which might be helpful to the inmate occurring during his period of incarceration. After considering this, a parole board might well exercise its discretion and not revoke parole, having the same effect as if he had served the sentence and any time which might be revoked as a result of the parole violation, concurrently. A parole violator stands to loose if he must be given a final parole revocation hearing while he is incarcerated. This is for the reason that he will not have time to build a sufficient record while incarcerated to mitigate against revocation of parole later and he will be without the argument that he has suffered enough punishment as a result of having committed the criminal offense. It is a fair assumption that the earlier a final parole revocation hearing is held, the more likely it is that parole will be revoked.

Amicus Curiae urges this Court to hold in accordance with the holdings in *Burdette* v. *Nock*, 480 F.2d 1010 (6th Cir., 1974); *Cook* v. *United States Attorney General*, 488

F.2d 667 (5th Cir., 1974); *Small* v. *Britton*, 500 F.2d 299 (10th Cir., 1974); *Gaddy* v. *Michael*, 519 F.2d 669 (4th Cir., 1975); *Reese* v. *United States Board of Pardon and Parole*, 530 F.2d 231 (9th Cir., 1976); *Gray* v. *Hogan*, 388 F.Supp. 476 (N.D. Ga., 1974); *Russell* v. *Cooper*, 16 Cr. L. 2455 (S.C., 1975); and *Wynsma* v. *Leach*, 536 P.2d 817 (Colo., 1975). Holdings to the contrary should be rejected. See, *Cleveland* v. *Ciccone*, 517 F.2d 1082 (8th Cir. 1975); *Cooper* v. *Lockhart*, 489 F.2d 308 (8th Cir. 1973); *Sutherland* v. *District of Columbia Board of Parole*, 366 F.Supp. 270 (D.C.D., 1973); *Fitzgerald* v. *Sigler*, 372 F.Supp. 889 (D.C.D., 1974); *Arnold* v. *United States Board of Parole*, 390 F.Supp. 1177 (D.C., D.C., 1975); *In Re Shapiro*, 537 P.2d 888 (Cal., 1975); and *United States ex rel. Han* v. *Revis*, 320 F.2d 632 (7th Cir., 1975).

If State parole boards are to be required to give a parole violator who has violated the terms and conditions of parole by committing a criminal offense a final revocation hearing during the time he is serving the sentence for the commission of such offense, where service of the sentence takes place in another State, they will be in a position whereby they must: (1) abandon all hope of revoking such parole violator's parole, or (2) hold the final revocation hearing at such out-of-State institution at great expense in terms of both time and money.

There is at present no method by which to obtain the presence of an alleged parole violator in the State from which he is paroled. The Uniform Detainer Act,[2] for example, is not applicable to such cases. Even if that Act were amended, or another one was in existence, the expense and burden of returning a parole violator to the State from which he was paroled, while not probably insurmountable,

[2] See *Uniform Laws Annotated* (1974), Vol. II, p. 321.

would nevertheless be extremely burdensome, particularly in light of the fact that it is not necessary to protect such parole violator's rights in this manner, as has been argued above.

Whether due process applies to governmental action has been stated to depend upon the extent to which an individual will be "condemned to suffer grievous loss." *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123 (1951) (Frankfurter, J., concurring).

Once it is determined that the Due Process Clause applies, whether a particular right is constitutionally required depends upon the significance of the claimed right, the nature of the proceedings, and the possible burden on those proceedings; requirements of due process vary according to the type of proceeding involved. *Hannah* v. *Larche,* 363 U.S. 420 (1960).

In applying the Due Process Clause, there must always be reached a balance. *Wolff* v. *McDonnell,* 418 U.S. 539 (1974). Administrative realities must be taken into account, *Wolff, supra; Morrissey, supra; Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973).

Amicus Curiae suggests that a balance must be struck in the case of an alleged parole violator incarcerated for the commission of a criminal offense in a foreign jurisdiction. Amicus Curiae further suggests that such a balance is struck where the paroling State and the incarcerating State so conduct themselves that the alleged parole violator does not suffer as a result of the existence of a parole violation detainer warrant and when any delay in holding a final revocation hearing is governed by the principles of *Barker, supra.* To require that a final revocation hearing be held while such individual is still incarcerated in a foreign jurisdiction places an undue burden upon the paroling States and tends to overlook administrative realities.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the judgment of the United States Court of Appeals for the Tenth Circuit be affirmed.

Respectfully, submitted

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed copies of the foregoing Brief of the Commonwealth of Virginia as Amicus Curiae in Support of Respondent to Phylis Skloot Bamberger, The Legal Aid Society, Federal Defender Services Unit, 509 United States Court House, Foley Square, New York, New York 10007, Counsel for Petitioner and to Robert H. Bork, Solicitor General, Department of Justice, Washington, D. C. 20530, Counsel for Respondent on July 26, 1976.

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